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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner, Service Storage and Transfer Co., Inc., hereafter referred to as "Petitioner" or "Service," respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the Supreme Court of Appeals of Virginia, wherein the order of the State Corporation Commission was affirmed in part, reversed in part, and remanded.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, — Va. —, 102

S.E. 2nd 339, and is reproduced in full text as Appendix I to this Petition. The opinion of the State Corporation Commission of the Commonwealth of Virginia is printed in Record at pages 69 *et seq.* and is reproduced in full text as Appendix II to this Petition. The report of the Interstate Commerce Commission in *Service Storage and Transfer Co., Inc.— Petition for Declaratory Order* is reported in 71 M.C.C. 304 and is reproduced in full text as Appendix III to this Petition.

JURISDICTION

Petitioner seeks review of the decision of the Supreme Court of Appeals of Virginia dated March 10, 1958, and entered on the same date. Jurisdiction of this Court is invoked under Title 28, U.S.C., section 1257(3).

QUESTIONS PRESENTED

(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission?

(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the "Commerce clause" of Article I, Section 8 of the Federal Constitution.

(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the

Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act.

STATUTES INVOLVED

Interstate Commerce Act, Part II, Section 303(10); Title 49, U.S.C., Section 303(10).

> "The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); *Title 49, U.S.C.,* Section 304(c):

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provisions of this chapter or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Title 56, Code of Virginia, Section 278; *Vol. 8,* page 235:

> "No common carrier by motor vehicle or restricted common carrier by motor vehicle not here-

in exempted shall engage in intrastate operation or any highway within a state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; *Vol. 8,* Cum. Supp.:

"The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

STATEMENT OF THE CASE

The Material Facts

The facts necessary to a complete and accurate understanding of the questions presented may be fully summarized as follows: Petitioner is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. (R.-Ex. 2) That certificate authorizes and requires petitioner to transport property by motor vehicle from certain Virginia origin areas through Bluefield, West Virginia to certain Virginia destination areas. Other operations not material to the questions before the Court are also authorized. In accordance with the requirements of its operating authority, Petitioner for a number of years has accepted for transportation shipments moving from Virginia origins to Virginia destinations. (R. 38) All such shipments have been transported through Bluefield, West Virginia, with the knowledge and intent of the shipper. (R. 38-43) Petitioner's operations between Virginia points are in complete accord with a specific interpretation of petitioner's operating authority by the Interstate Commerce Commission. (Appendix III)

In September 1956 the State Corporation Commission instituted criminal proceedings against petitioner, wherein it was alleged that the transportation by petitioner of certain shipments between Virginia points constituted intrastate commerce and was therefore in violation of Virginia law. Petitioner defended on the ground that the questioned operations were interstate in character and were authorized by its interstate certificate as specifically construed by the Interstate Commerce Commission. The State Corporation Commission fined the carrier a total $5,000.00 ($500 on each of ten shipments found to have been trans-

ported in violation of Virginia law). On appeal the Supreme Court of Appeals of Virginia affirmed the order of the State Corporation Commission on seven of the alleged violations and reversed on the other three. This petition seeks review of the action of the Supreme Court of Appeals, to the extent it affirmed the order of the State Corporation Commission.

Petitioner's Contentions

(1) The Interstate Commerce Commission in *Atlantic Freight Lines, Inc.* 51 M.C.C. 175 has clearly stated petitioner's first principal contention:

> "... that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 M.C.C. 186.

In support of that Conclusion the Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* 60 A. (2d) 589, wherein it was held:

> "* * * that the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this Commission; that when this Commission has determined that certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 M.C.C. 178.

(2) Petitioner's second contention was clearly stated in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 63:

"Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Section 306 of 49 U.S.C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity. And Section 312 of the same title provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided.' But in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it. *Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate.*" (Emphasis added)

THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED

The Federal questions involved herein were raised in a timely manner and considered by both the State Corporation Commission and the Supreme Court of

Appeals of Virginia. Petitioner introduced its interstate certificate of public convenience and necessity before the State Corporation Commission, (R. 33), and asserted that the interstate operations alleged to be illegal were authorized by said certificate (R. 33 et. seq.). In its opinion the Corporation Commission considered the Federal question presented when it stated (R. 74):

> "Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether it *is* an interstate movement or whether the I.C.C. *says* it is an interstate movement."

As a basis for its decision, the State Corporation Commission chose to apply its interpretation of *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, 49 S. Ct. 532, 83 L. Ed. 641. The Commission referred to "The rule laid down by the Supreme Court in *Eichholz*, namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal" (R. 78).

That the State Corporation Commission considered the federal question raised is also made clear by the following statement contained in the opinion of the Commission:

> "Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant are correct, it would follow that a carrier holding a federal certificate of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following

things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Asland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render." (Appendix 25(a))

Petitioner also presented the Federal issues involved to the Supreme Court of Appeals of Virginia. The following assignments of error were urged on brief to that Court:

"(1) The action of the Commission is beyond its jurisdiction."

"(2) The action of the Commission is in contravention of Section 203(10) of Part II of the Interstate Commerce Act and constitutes an unlawful collateral attack on an outstanding and valid order of the Interstate Commerce Commission."

"(3) The Interstate Commerce Commission has exclusive jurisdiction over the subject matter and any request for relief by the State Corporation Commission had to be addressed to the Federal Commission."

Since these assignments of error challenged the jurisdiction of the Virginia Courts they necessarily had to be considered by the Supreme Court of Appeals in affirming the judgment as to the fines imposed upon petitioner. In its opinion the Supreme Court of Appeals noted petitioner's argument that the move-

ments constituted interstate commerce. It then stated:

> "The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of state authority." (Appendix I)

REASONS SUPPORTING THE GRANT OF THE WRIT

(a) Preliminary Statement

There is a clear and pressing need for this Court to express itself on the questions involved in this proceeding. As has been shown, the decision of the Virginia State Court of Appeals requires petitioner to pay $3,500 in fines for conducting its transportation business in accordance with a federal mandate. Petitioner is required to render service between authorized Virginia points to the shipping public as authorized by its interstate franchise as interpreted by the Interstate Commerce Commission or be subjected to certificate revocation proceedings under the Interstate Act. Petitioner is an innocent victim in a direct clash of governmental authority, one state and the other federal.

Petitioner contends that sound, consistent and authoritative administration of Part II of the Interstate Commerce Act, by the Interstate Commerce Commission requires this Court to grant certiorari so as to inform that Commission and the carriers subject to its jurisdiction whether interstate certificates may be given an interpretation by state authorities which conflict with those of the federal Commission. Petitioner further submits that the stability of the

national motor carrier industry intended by Congress when enacting federal regulation of the industry cannot be achieved nor maintained if certificated interstate motor carriers are to be required to serve two masters. The importance of the issue presented is indicated by the fact that litigation involving interstate motor carrier certificates has been frequently before the lower federal courts, the state courts and the Interstate Commerce Commission.

See, for example, *Roundtree* v. *Terrell*, 22 F. Supp. 297; *Andrew G. Nelson, Inc.* v. *Jessup*, 134 F. Supp. 221; *Atlantic Freight Lines, Inc.—Interpretation of Certificate*, 51 M.C.C. 175; *Atlantic Freight Lines, Inc.* v. *Pennsylvania P.U.C.*, 60 A. (2d) 589, 163 Pa. Super 215.

(b) The Supreme Court of Appeals of Virginia Has Decided a Federal Question of Substance Not Heretofore Determined By This Court

Petitioner knows of no decision of the Supreme Court of the United States in which the question raised by this petition has been specifically dealt with. A similar, if not the same issue, was presented in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, 336 U.S. 925 by petition for certiorari. This Court refused to grant the petition presumably on the ground that at the time the writ was requested the Interstate Commerce Commission had not given its interpretation of the authority contained in the certificate there in question. See *Atlantic Freight Lines, Inc.—Interpretation of Certificate*, 51 M.C.C. 175, 179, 186.

Although this Court has not decided the precise issue presented here, lower federal courts and the

Interstate Commerce Commission have been consistent in holding that interstate certificates of public convenience and necessity may be construed authoritatively only by the Interstate Commerce Commission and that such construction is binding on the state authorities. *Atlantic Freight Lines, Inc.—Interpretation of Certificate,* 51 M.C.C. 175, *Andrew G. Nelson, Inc.* v. *Jessup,* 134 F. Supp. 221, and *Roundtree* v. *Terrell,* 22 F. Supp. 297.

(c) The Supreme Court of Appeals of Virginia Has Decided a Substantial Federal Question Not In Accord With Applicable Decisions of This Court

As a motor carrier, certificated by the Interstate Commerce Commission to transport property in interstate commerce, Service Storage and Transfer Co., Inc. is obligated to render reasonably continuous and adequate service to the public to the full extent of the authority held. Indeed, Petitioner's certificate (Exhibit No. 2) specifically imposes such a requirement and the provisions of Section 212(a) of Part II of the Interstate Commerce Act subjects petitioner to the loss of its franchise for failure to provide the services authorized. It is because of this duty that Petitioner throughout this proceeding has resisted the interference of the state authorities, in spite of the fact that the traffic in question constitutes a relatively small portion of its business.

It is apparent that Service cannot conduct the operations required of it pursuant to the Interstate Commerce Act without violating the rule set forth in the decision from which review is now sought. Resolution of the dilemma created by the decision requires the action of this Court.

The State Corporation Commission has collaterally attacked the order of the federal Commission pursuant to which petitioner conducts interstate operations. That Commission has determined that the certificate held by Service does not authorize transportation between certain Virginia points. The State takes the position that it may determine with finality what constitutes "interstate commerce" and may force discontinuance of operations authorized by a certificate issued by the Interstate Commerce Commission.

In acting so as to impose criminal penalties upon Petitioner, the Commonwealth of Virginia has ignored both a federal statute and decisions of this Court which indicate that the forum having primary jurisdiction of the issues raised by the Virginia authorities is the Interstate Commerce Commission. Section 204(c) of Part II of the Interstate Commerce Act, *Title 49, U.S.C.*, Section 304(c), provides that "State boards" as well as other interested parties may resort to the Interstate Commerce Commission for relief in instances where authorized carriers are alleged to be operating beyond the scope of their interstate certificates. With reference to Section 204(c) this Court pointed out in *Castle* v. *Hayes Freight Lines*, 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 151, that:

> "If therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the states interest either on the Commission's own initiative or on complaint of the state."

In *Andrew J. Nelson, Inc.* v. *Jessup*, 134 F. Supp. 221, 228, the United States District Court for the Southern District of Indiana observed in a factual

situation not greatly dissimilar from that presented here as follows:

> "The interpretation of a federal permit by state officers is contrary to the principle that '(t)he precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the Commission. Noble v. United States, 1942, 319 U.S. 88, 93, 63 S. Ct. 950, 952, 87 L. Ed. 1277. Circuit Judge Sanborn in Dart Transit Co. v. Interstate Commerce Commission, D.C. 1953, 110 F. Supp. 876, 880, stated: 'It is our opinion that in an action such as this, a court may not substitute its judgment for that of the Commission with respect to the question of the scope or coverage of a permit which the Commission has issued to a motor carrier, if that question is at all doubtful.' Also see, Pomprowitz v. United States, D.C. 1954, 119 F. Supp. 824. It seems reasonably deducible from this proposition that if the courts, in the exercise of judicial restraint, refuse to project themselves into the area granted exclusively to the Interstate Commerce Commission, except where the order is clearly wrong or arbitrary; United Truck Lines v. Interstate Commerce Commission, 9 Cir., 189 F. 2d 816, then certainly the construction of an interstate carrier's permit by state officials is untenable."

In addition Petitioner maintains that the decision of the Supreme Court of Appeals of Virginia in the instant case has misapplied and misinterpreted decisions of this Court and has failed to apply others. Both the State Corporation Commission and the Supreme Court of Appeals place reliance upon *Eichholz* v. *Public Service Commission of Missouri,* supra, which was taken to mean that any shipment is intrastate, even though it may pass through a sister

state, if it follows an "abnormal route." Petitioner is confident that this Court will immediately recognize that the Virginia Courts have misconstrued the doctrine applied in *Eichholz*. Unlike petitioner, Eichholz did not hold a certificate of public convenience and necessity from the Interstate Commerce Commission. The reason that this Court approved the Missouri Commission's assumption of jurisdiction in *Eichholz* was expressed with great clarity by Chief Justice Hughes' at 306 U.S. 273:

> "When the (Missouri) Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic on the state highways had not been superseded." *H. P. Welch Company* v. *New Hampshire,* 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 43.

Together the opinions of this court in both *Eichholz* and *Welch* reflect application of the principle that until the Federal government has acted, state governments have authority within limits to regulate interstate commerce under their police powers. Equally clear in the opinions, however, is the rule that when the Federal government has "occupied the field" the state governments are precluded from exercising jurisdiction.

In its haste and predisposition to conclude that the operations in question were intrastate in character the State of Virginia failed to recognize that state action of the type taken had been foreclosed by the exercise of the paramount powers of the federal

government. The Virginia authorities failed to give effect to the rule of decision applied by this court in *Bethlehem Steel Company* v. *New York Labor Relations Board,* 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, and *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 151. The governing principle was well stated in the *Bethlehem Steel Company* case, at page 773, as follows:

> "In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this court has usually held that the police power of the state may be exercised . . . *H. P. Welch Company* v. *New Hampshire* . . . but when Federal administration has made comprehensive regulation effectively governing the subject matter of the statute, the court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the Federal agency."

CONCLUSION

Section 203(10), *Part II, Interstate Commerce Act* (49 U.S.C. Section 303(10) defined interstate commerce as follows:

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The State of Virginia has redefined that term as follows:

> "Commerce between places in the same state through another state when such commerce moves over a 'normal, regular, or usual route' between the points involved."

This Court should conclude that the action of the State of Virginia is in contravention of the Interstate Commerce Act and the "Commerce clause" of Constitution and grant certiorari.

Respectfully submitted,

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APPENDIX I

Present: All the Justices

OPINION BY JUSTICE KENNON C. WHITTLE

Richmond, Virginia, March 10, 1958

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INC.

v.

COMMONWEALTH OF VIRGINIA

FROM THE STATE CORPORATION COMMISSION OF VIRGINIA

This is an appeal of right from an order of the State Corporation Commission wherein Service Storage and Transfer Company, Inc. (hereinafter called Service) was fined $500 for each of ten alleged violations of Chapter 12, Title 56, Code of Virginia, 1950, the aggregate of the fines being $5,000.

The case grows out of a prosecution of Service under § 56-304.12 of the Code for allegedly operating as a common carrier in intrastate commerce on the highways of Virginia without a certificate of convenience and necessity in violation of § 56-278.

Service is a common carrier by motor vehicle, operating under authority of Certificate No. MC-30471, issued by the Interstate Commerce Commission. The territory covered in the certificate follows:

"Between Bluefield, Va., Bluefield, W. Va. and points and places within five miles of Bluefield, W. Va.

(1) "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

(2) "Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

The manifest object of the Interstate Commerce Commission's certificate was to permit Service to engage in interstate commerce. This is the extent of the commission's jurisdiction. Under the ICC certificate Service was empowered, (1) to gather freight within the defined territory and transport it out of Virginia into other jurisdictions; and (2) to gather freight within the defined territory, haul it out of the State and thence back to points within the defined territory, provided it acted in good faith and did not route the freight out of Virginia for the purpose of evading Virginia's jurisdiction. We are here concerned with the latter right.

It is contended by the Commonwealth that Service operates between points in Virginia by way of Bluefield, West Virginia; that the routes employed are not the usual or normal routes but are circuitous routes used for the purpose of evading the Virginia law; that Service was fined on July 9, 1956 for similar violations from which no appeal was taken; that since the imposition of that fine Service has continued to violate the rule issued by the State Corporation Commission, resulting in the issuance of the present rule which is the basis for the fines involved on this appeal.

A fine of $500 was imposed upon Service for goods shipped by alleged circuitous routes in each of the following instances:

Origin	*Destination*
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bluefield, Virginia	Haysi, Virginia
Bristol, Virginia	Wise, Virginia
Roanoke, Virginia	Kimbleton (Kimballton), Va.
Bristol, Virginia	Cranes Nest, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Abingdon, Virginia

It was stipulated that each shipment went through Bluefield, West Virginia.

The Commonwealth established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved. It was urged that the goods in question had been shipped by Service over unnecessarily long and circuitous routes for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia.

The several charges against Service were developed by the Commonwealth as follows:

On August 21, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, on which was found a shipment from Rish Equipment Company, Roanoke, Virginia, to the Heron Todd Steel Construction Company, Inc., Glen Lyn, Virginia. This shipment had moved from Roanoke to Bluefield, West Virginia, and thence back to Glen Lyn, whereas the usual or normal route would have been direct from Roanoke to Glen Lyn, entirely within the State.

On August 22, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north Pearisburg, Virginia, where he found a shipment from Norfolk and Western Industries, Inc., Lynchburg, Virginia, to Sutphin

and Jackson, Draper, Virginia. This shipment had moved from Lynchburg to Bluefield, West Virginia, and thence back to Draper, when the usual or normal route would have been from Lynchburg to Draper, wholly within the State.

On September 6, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, wherein he found a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia. This shipment moved from Roanoke through Bluefield, West Virginia, and thence back to Wytheville. The usual or normal route for this shipment would have been from Roanoke to Wytheville, wholly within the State.

On September 11, 1956, an investigator stopped a truck owned by Service on Route 58 near St. Paul, Virginia, on which he found a shipment from Bristol Steel and Iron Works, Bristol, Virginia, to Link Belt Company, Carbo, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, and thence back to Carbo, when the usual or normal route would have been from Bristol to Carbo, wholly within the State.

On September 11, 1956, a truck owned by Service was stopped by an investigator on Highway 58, near St. Paul, Virginia. The truck contained a shipment from F. D. Lazenby and Company, Bluefield, Virginia, to Haysi Hardware Company, Haysi, Virginia. This shipment went from Bluefield, Virginia to Bluefield, West Virginia, and thence back to Haysi, and did not take the usual or normal route which lies wholly within the State.

On September 13, 1956, another shipment was involved, from Bristol Steel and Iron Works, Bristol, Virginia, to Quesenberry Construction Company, Wise, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Wise, when the usual or normal route would have been from Bristol to Wise, wholly within the State.

On September 17, 1956, an investigator stopped a truck owned by Service at the junction of U. S. Highways 58 and 72, at Coeburn, Virginia, on which he found a shipment of iron railway car wheels from Enterprise Wheel and Car Corporation, Bristol, Virginia, to Banner Fuel Corporation, Cranes Nest, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Cranes Nest, when the usual or normal route would have been from Bristol to Cranes Nest, wholly within the State.

An examination of the maps of the State of Virginia, introduced as exhibits, showing the network of improved roads between the points here involved, conclusively shows that the routes used by Service in moving the various shipments were not the usual or normal routes. The commission was justified in finding, on this uncontradicted evidence, that Service had used these circuitous routes in an effort to bring the shipments within the purview of the authority granted under its certificate from the Interstate Commerce Commission.

Service assigns six errors, the first four of which can be embodied in the question: Is the State Corporation Commission vested with the authority to regulate intrastate commerce in these instances, and, if so, did it act within the grant of that authority in assessing the fines upon Service? Service thus contends that the action of the State Corporation Commission is beyond its jurisdiction. Section 56-278, Code of Virginia, 1950, reads:

> "§ 56-278. REQUIRED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.—No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight,

and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

It is clear from the above section that the State Corporation Commission is vested with authority to issue certificates of public convenience and necessity in proper instances where a common carrier by motor vehicle applies for same. The obvious purpose of the section is to give the Commission control over intrastate traffic on the highways of the Commonwealth. It is conceded that Service did not hold such a certificate.

The governmental regulation and supervision by a State of its internal commerce may lawfully be exerted through validly constituted administrative commissions or boards. *Pa. R.R. Co.* v. *Towers,* 245 U. S. 6, 62 L. ed. 117, 38 S. Ct. 2, L.R.A. 1918C 475.

A commission, if authorized by the law of the State, may make orders and regulations concerning intrastate commerce which do not conflict with the enactments of Congress, and its discretion in this respect may be exercised upon a view of all existing relevant facts and circumstances. *Ill. C. R.R. Co.* v. *De Fuentes,* 236 U. S. 157, 59 L. ed. 517, 35 S. Ct. 275.

It will be observed that the commerce here involved moved from points in Virginia through Bluefield, West Virginia, and then back to points in Virginia. Service argues in its brief that such movements constitute interstate commerce as defined by its ICC certificate. It says:

"The carrier (Service) also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (meaning paragraphs 1 and 2 in its ICC certificate heretofore quoted). It is as though two independent

carriers were interchanging freight, one with the other, at Bluefield, West Virginia. To exemplify, upon receiving a request to transport a shipment from Lynchburg, Virginia, to Draper, Virginia, the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above, and transport it to its terminal at Bluefield, West Virginia. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above."

Such a movement as suggested would be a mere subterfuge, and an attempt to divest the State Corporation Commission of its jurisdiction over intrastate commerce. 15 C.J.S., Commerce, § 24, pp. 289, 290, Footnote 18. Why ship goods from Lynchburg, Virginia, to Draper, Virginia, through Bluefield, West Virginia, when the obvious usual or normal route would be direct from Lynchburg to Draper, wholly within the State?

> "Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the substantial surrounding circumstances." 15 C.J.S., Commerce, § 18, p. 278.

Of course, there are many instances in which shipments between points in the same State can properly be identified as interstate commerce, where the shipments follow the usual or normal routes between the points involved. That is not the case here. An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the "normal or usual" routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought.

The reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641, 646, 59 S. Ct. 532, is applicable here. There it is said:

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merhandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 244, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * * ."

The reasoning employed in *Eastern Carrier Corp.* v. *U. S.*, 31 F. Supp. 232, 236, is also applicable:

"* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.

"The definition sought to be applied by the plaintiff for the phrase 'bona fide operation' is one which cannot be supported with any show of reason. This clearly appears from the authority which the plaintiff itself cites in Slagle Contract Carrier Application, 2 M.C.C. 127, 141, wherein the Commission said: ' * * * The

> Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud".' "

Under our dual system of government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the State, and within the limitation of the State Constitution the authority of the legislature is supreme in the regulation of intrastate transportation by common carriers unless such regulation in effect deprives a person of property without due process of law or materially burdens interstate commerce in violation of the Constitution of the United States. On the other hand, the power to regulate interstate and foreign commerce is, by provisions of the Federal Constitution, vested in Congress, and has been exercised by the enactment of the Interstate Commerce Act. 9 Am. Jr., Carriers, § 44, p. 453, and cases cited under Footnote 17.

The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of State authority.

Service's next assignment of error challenges the right of the State Corporation Commission to assess fines against it in the absence of a rule to show cause alleging specific violations. This assignment is directed to three alleged shipments, originating at Roanoke, Lynchburg and Roanoke, Virginia; their respective destinations being Kimballton, Marion, and Abingdon, Virginia.

The Attorney General concedes the lack of proper allegations and proof to justify the finest imposed in these three instances. This will require an amendment to the Commis-

sion's order, resulting in a reduction in the combined fines against Service from $5,000 to $3,500.

The final assignment of error reads: "The Commission erred in holding that its decision in a prior case is res adjudicata as to the issues involved in this proceeding."

In view of our disposition of the case on its merits it is not necessary to consider this assignment.

For the reasons stated the order of the State Corporation Commission is affirmed in part, reversed in part and remanded, with directions that the order be amended in accordance with the views here expressed.

Affirmed in part;
reversed in part,
and remanded.

APPENDIX II

page 135 } COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

RICHMOND

City of Richmond, February 26, 1957.

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On November 29, 1956, came on for hearing the rule issued against Service Storage & Transfer Company, Incorporated, for specified violations of Chapter 12, Title 56

of the Code of Virginia in transporting property for hire between points in Virginia in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny and O. L. Shewmake appeared for the defendant. William C. Seibert appeared for the Commission.

The testimony shows and the defendant admits the transportation of property for compensation between the points in Virginia set forth in the rule.

From the following Virginia points of origin to the destinations shown, the only normal, regular or usual route is intrastate:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Kimbleton, Virginia
Roanoke, Virginia	Abingdon, Virginia

and the Commission finds that the transportation of goods from the above named origin points to the above named destination points in the State of Virginia is in violation of Chapter 12, Title 56 of the Code of Virginia; and it appearing that by order in Case No. 13074 the defendant was fined $25.00 for the transportation of property intrastate over the same or similar routes, it is

page 136 } ADJUDGED, ORDERED AND DECREED, That the defendant be fined $500.00 for each of the said violations, making a total of $5,000.00, together with the

costs of this proceeding; and that a writ of *fieri facias* do issue in favor of the Commonwealth of Virginia against the defendant.

A True Copy.

Teste:

N. W. ATKINSON
Clerk of the State Corporation Commission.

page 137 } COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

March 21, 1957.

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, *Chairman.*

This case is a prosecution of the defendant for operating as a common carrier by motor vehicle in intrastate commerce on the highways of Virginia without a certificate of public convenience and necessity in violation of § 56-278 of the Code of Virginia. The defendant holds certificates of public convenience and necessity issued by the Interstate Commerce Commission, but none from this Commission. There is no dispute as to the facts. The legal problem is where to draw the line between interstate and intrastate commerce. The defendant's I. C. C. certificates, of course, expressly limit the defendant's operations to interstate commerce. Notwithstanding the generality of the language in those certificates describing the geographical boundaries in which defendant may operate, the cer-

tificates contain a limiting clause to the effect that the holder of the certificate is granted authority:

"* * * to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle * * *"

page 138 } Our inspectors discovered that the defendant was holding itself out as a common carrier to transport and was transporting property for compensation between numerous points in Virginia. Accordingly a rule was issued under § 56-304.12 of the Code, which provides:

"The Commission may, by judgment entered after a hearing * * * if it be proved that the defendant * * * has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State * * * impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law."

Pursuant to the applicable provisions of the State Constitution the Commission, in cases of this kind, sits judicially as a court of record. The Commission fined the defendant $500 for each of ten specified violations of the law, making a total of $5,000 and costs; and issued a writ of *fieri facias*. Execution of the writ will be held in abeyance so long as defendant's petition for a writ of *supersedeas* is pending in the Supreme Court of Appeals.

The large size of the fine (one-half the maximum provided by law) is because in a prior case involving the same defendant, the same course of conduct and the same law, the Commission fined the defendant $25 for the purpose of settling the law of the case. The defendant paid the fine, did not take an appeal, and continued to operate in the same manner as before. Since $25 is all it costs to get a certificate of public convenience and necessity, it is manifest that the fine will have to be adjusted up-

page 139 } ward until it has a deterrent effect.

The prior case was Case No. 13074. It was

heard on June 28, 1956, and final judgment was entered on July 9, 1956. Our decision in that case is *res judicata* in this case. Pursuant to the authority conferred on it by § 155 of the Constitution, the Commission has adopted the following rule:

"15. *Res Judicata.* The doctrine of *res judicata* applies to final judgments, orders and decrees entered by the Commission sitting as a court of record. It does not apply in cases in which the Commission has a duty of continuous supervision or in any case in which a matter is reserved for further consideration."

The final order in that case is as follows:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On June 28, 1956, came on for hearing the rule awarded against Service Storage & Transfer Company, Incorporated, alleging the transportation of property in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny appeared as counsel for the defendant. William C. Seibert appeared for the Commission.

It appearing to the Commission that from the evidence submitted the defendant did, as alleged in the rule of the Commission of June 11, 1956, transport prop-
page 140 } erty in intrastate commerce without the authority of the State Corporation Commission in vio-

lation of Chapter 12, Title 56 of the Code of Virginia, a fine of $25.00 and costs of the proceeding shall be assessed against the said defendant.

IT IS, THEREFORE, ORDERED:

(1) That Service Storage & Transfer Company, Incorporated, be, and it is hereby, fined the sum of $25.00 and costs of the proceeding.

(2) A copy of this order shall be sent to Francis W. McInerny, counsel for the defendant."

The Commission delivered the following opinion in that case:

"COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, *Commissioner.*

This is a rule to show cause why the defendant should not be punished for operating intrastate in Virginia as a common carrier of property without a certificate of convenience and necessity from this Commission.

The defendant admits the facts alleged in the rule. Its defense is that it can lawfully transport goods between Virginia points so long as it carries them out of the state and back again. It asserts, for example, the right to carry goods from Roanoke to Wytheville (which is 80 miles down Route 11), so long as it hauls them 160 miles around by Bluefield, W. Va.

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Its federal certificate authorizes the defendant to engage in *interstate* commerce within 75 miles of Bluefield: the certificate specifies territory and not routes. If an I. C. C. certificate can and does grant the authority claimed by the defendant, the state commissions might as well go out of business.

The defendant relies on Atlantic Freight Lines, Inc., 51 M.C.C. 175 (1949) in which Division 5 of the Interstate Commerce Commission ruled that a movement from Pittsburgh to Philadelphia was interstate commerce if the movement goes by way of Baltimore.

Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether it *is* an interstate movement or whether the I. C. C. *says* it is an interstate movement. Division 5 favors the latter view. In *Eichholz* v. *Missouri P. S. C.*, 306 U. S. 268, the Supreme Court upheld the authority of a state commission. Division 5 explained that the Supreme Court was able to render that decision only because Division 5 had not spoken. It said (p. 190):

'Thus, the situation presented in that case is dissimilar in a very material respect from that here present. There the State acted while the carrier's application for authority was still pending before us and before we had decided the matter and assumed jurisdiction over the inter-
page 142 } state movement. Here the application has been finally adjudicated and we have assumed jurisdiction. Accordingly, the *Eichholz* case is not authority for the proposition that the issue can be reopened and reviewed collaterally after we have finally determined the character of commerce to be interstate, have assumed jurisdiction, and have issued the certificate.'

If that declaration of the Interstate Commerce Commission is taken at its face value, that Commission could law-

fully make a binding adjudication that transportation between Richmond and Petersburg was interstate. Of course that declaration is to be read in its context, and the I. C. C. would presumably admit that it could not, by its mere say so, transmute intra into interstate commerce.

When the actual physical movement of the vehicle crosses the state line and back again the question of whether it thereby escapes state regulation depends on whether the movement was *'bona fide.'* Whether the movement was *bona fide* cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinarily prudent carrier not restrained by regulation would use that route. The defendant drives 160 miles from Roanoke to Wytheville not because that is a sensible way to go but because it crosses the line into West Virginia. No *unregulated* carrier would do such a thing. Our conclusion is that when a carrier follows a circuitous route for the purpose of escaping state regulation he does not escape it. And we judge his purpose not by what he says his purpose is, but by what it appears to be from looking at a highway map.

page 143 } In *Eicholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641 (1939) the carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri, through his terminal in Kansas City, Kansas, which was located less than half a mile from the Missouri line. In holding that the state commission had jurisdiction, the court said (p. 274):

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid * * *. We may assume that Congress

could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * *"

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948), a carrier of passengers between termini in New York transported them over a route 42% of which was in other states. New York imposed a gross receipts tax on the total operation, and the New York Court of Appeals held that 'This is not interstate commerce.' The Supreme Court held that only 58% of the gross
page 144 receipts could be taxed in New York. The court's opinion intimates that the *Eichholz* test is still valid, saying (p. 660):

"There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, e. g., *Eichholz* v. *Public Serv. Commission*, 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532; and *Ryan* v. *Pennsylvania Pub. Utility Commission*, 143 Pa. Super 517, 17 A 2d 637. We are not dealing with a necessary deviation or a calculated detour."

The Motor Carrier Act of 1935 provides that a carrier seeking a grandfather certificate must prove that he 'was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the ter-

ritory for which application is made * * *' Thus the statute compels the courts to give meaning to the elusive phrase '*bona fide.*' In *Eastern Carrier Corporation* v. *United States,* 31 F. Supp. 232 (1939) the applicant, prior to 1935, transported property between termini in Pennsylvania. First it ran through Hackettstown, about 25 miles over in New Jersey, and then established a terminal at Bridgeville, New Jersey, about five miles from the border. The Interstate Commerce Commission decided that this was not *bona fide* interstate commerce, saying:

"The fact that a terminal has now been erected at Bridgeville, and the routes have been shortened by using that as a transfer point instead of Hackettstown does not give the color of genuineness to operations which, from their very inception, were fraudulent.'

The three-judge federal court agreed with the Commission, saying (p. 237):

page 145 } "The Eichholz case appears to be nearly the converse of that at bar. The Supreme Court, by the Chief Justice, stated (306 U. S. at page 274, 59 S. Ct. at page 535, 83 L. Ed. 641): 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.' The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase '*bona fide* operation' employed in the grandfather clause of the Motor Carrier Act."

Dohrn Transfer Co. v. *Hoegh,* 116 F. Supp. 177 (1953) was a suit before a three-judge court to enjoin state officials

from enforcing Section 325.6 of the Code of Iowa as amended in 1953. The 1953 amendment provided:

"It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, *including the crossing of any state line of the state of Iowa,* or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." (Italics added).

This statute is right in the teeth of 49 U. S. C. A. §303 (10), which provides:

"The term 'interstate commerce' means commerce between any place in a State and any place in another State *or between places in the same State through another State,* whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (Italics added).

page 146 } The court refused to hold Section 325.6 void on its face, for the reason that it could be enforced to the extent permitted by the *Eichholz* test without conflicting with the federal statute. The court said (p. 189):

"In situations such as those disclosed in the case of *Eichholz* v. *Public Service Commission of Missouri,* 1939, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, the commerce clause would not be an impediment to the enforcement of the provisions of Section 325.6 as amended or to its applicability.

"It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to

the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

The court took a realistic and common sense view of both statutes. It did not take either the federal statute or the state statute literally. It construed both of them in conformity with the rule laid down by the Supreme Court in *Eichholz,* namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal. The essence of the *Eichholz* rule is contained in the Supreme Court's quotation (at p. 271) of the District Court's finding that the carrier's route was not

'the normal, regular or usual route.'

There can seldom be doubt whether a route is normal, regular or usual.

In the *Dohrn Transfer Co.* case the routes followed by the carrier through Illinois between towns in Iowa were normal, regular and usual because bends in the Mississippi river made it normal, etc., to cross the river over and back. To illustrate this point the court gives a table of miles on page 180 of its opinion showing that the routes through Illinois were either the same as, shorter than or not more than three miles longer than the intrastate routes in Iowa.

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We have no doubt that the shipments set forth in the rule to show cause were subject to regulation by Virginia within the rule laid down in the *Eichholz* case. That rule clearly does not authorize the defendant to carry a parcel across the state line and then bring it back into Virginia over the same route. It would not be normal, regular or usual to transport goods from Roanoke to Bluefield, W. Va., and back to Salem or back to Pearisburg.
King, *Chairman* and Hooker, *Commissioner,* concur."

In applying the *Eichholz* rule there might be some situations in which reasonable men might differ as to whether a given route is "the normal, regular or usual route." Be-

cause of that possibility the following letters were exchanged between counsel for the carrier and commerce counsel:

"Washington 6, D. C.

July 12, 1956.

William C. Seibert, Esquire
Commerce Counsel
State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

page 148 } "Dear Mr. Seibert:

"Yesterday I received from the Virginia State Corporation Commission its order holding that the operations complained of in case No. 13074 Commonwealth of Virginia *v.* Service Storage and Transfer Company, Inc., constitute operations in intrastate commerce in violation of certain provisions of the code of Virginia. I am reporting the results of this proceeding to officials of the company with recommendations and I expect to be advised on the company's intentions in respect to appeal or other action by July 20, 1956. In the circumstances, may I request that the effectiveness of the commission's order be delayed until August 1, 1956, so that the company may make determinations as to what future action, if any, should be taken.

"I desire to re-emphasize that it is the company's intention to comply with both the law of Virginia and the requirements of the Interstate Commerce Commission and the certificate which carrier holds. As we advised your Commission during the course of the hearing on this matter, the carrier is anxious to be informed with some degree of certainty as to what it may or may not do in transporting shipments between Virginia points through the gateway of Bluefield, West Virginia. The opinion of the Commission itself recognizes (Page 2, second paragraph) that

'transportation from points in a state to another point in the same state is *sometimes* interstate commerce.' The carrier's position on the matter is that it is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not. In an effort to avoid protracted litigation on the question, we respectfully request your office to advise us informally as to what its judgment is on the matter. For as you can understand in the absence of an authoritative guide or standard, the carrier would continue to subject itself to prosecutions and fines on the acceptance and transportation of any shipment moving from one Virginia point to another. The carrier and its officials are fully aware that the problem is one that has a 'twilight zone' and presents difficulty for your enforcement staff. It believes, however, that the continued attitude of cooperation between the carrier and your office may result in an appropriate solution to the problem.

Very truly yours,

FRANCIS W. McINERNY."

page 149 } "COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Richmond

July 13, 1956.

Francis W. McInerny, Esquire
1625 K. Street, N. W.
Washington 6, D. C.

Dear Mr. McInerny:

Company, Incorporated.

"A reasonable time is given for the payment of fines assessed by the Commission. We shall expect this fine to be paid in that time.

"Concerning the statement in your letter that the carrier is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not, I will advise you that it appears to me you have a choice of two courses. Under the Rules of Practice and Procedure of this Commission, and I am enclosing a pamphlet containing these rules, you may ask for a declaratory judgment. This is referred to under Rule 13 as shown in the pamphlet attached. The alternative it appears to me, is to reach an agreement as to what might be considered interstate movement and what might be considered?

"I have your letter of July 12, regarding the decision of this Commission in Case No. 13074 in which a fine of $25.00 and costs was assessed against the Service Storage & Transfer intrastate movement on shipments in the territory served by the Service Storage and Transfer Company, Incorporated. I believe, as I stated to you before, that we could reach some sort of an agreement as to what points we would consider as properly interstate and unless we received a complaint with respect to the movement we would allow our investigators to observe the same understanding. This agreement might be reached after a conference between us.

"I am sure you understand that it is our desire to cooperate with you and your client at all times. We are here to assist as well as to regulate.

Very truly yours,

WILLIAM C. SIEBERT
Commerce Counsel."

page 150 } Thereafter our inspectors on the highways reported that the defendant had not changed its method of doing business; and the rule in the present case was issued. The rule came on for hearing on

November 29, 1956, and the evidence and argument followed the same pattern as in the prior case. Counsel for the defendant asked leave to file a brief and leave was granted on the assumption that the defendant would abide by the law laid down in the prior case in the meantime.

The final judgment in this case was entered on February 26, 1957. The judgment describes ten routes that the carrier has served in intrastate commerce and fines the defendant $500 for each of ten violations.

Counsel for the defendant makes the point that the Interstate Commerce Commission has jurisdiction to interpret the meaning of its own certificates. We do not find in the record evidence that that Commission has interpreted the defendant's certificate to mean that it is authorized to do what we have punished it for doing. There are of course limits on the authority of a federal commission to interpret certificates issued by it. It could not, under the guise of interpretation, enlarge the authority delegated to it by Congress or the power delegated to Congress by the Constitution.

Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant page 151 } are correct, it would follow that a carrier holding a federal certificate of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Ashland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render.

In issuing certificates of convenience and necessity the regulatory bodies are required by the governing laws to issue no more certificates than are necessary to serve the public. State certificates cannot authorize a carrier to cross the state line. If federal certificates can authorize the movement of goods from Richmond to Ashland or Richmond to Petersburg the state regulatory pattern will be destroyed and the beneficent purposes of the state laws cannot be accomplished. Our conclusions are (1) The Constitution does not authorize Congress to regulate the transportation of a parcel consigned from Roanoke to Salem; (2) Congress has not authorized the I.C.C. to regulate the transportation of a parcel consigned from Roanoke to Salem; (3) The I.C.C. has not authorized the defendant to transport a parcel consigned from Roanoke
page 152 } to Salem. The defendant may transport freight from one Virginia city to another only when a normal, regular or usual route between the cities crosses the state line.

Hooker, Commissioner, concurs.

APPENDIX III

INTERSTATE COMMERCE COMMISSION

No. MC-30471

SERVICE STORAGE & TRANSFER CO., INC.,—PETITION FOR DECLARATORY ORDER

Decided March 29, 1957.

Upon petition, found that certificate of public convenience and necessity issued to petitioner authorizes the transportation of general commodities, with exceptions, in interstate or foreign commerce, between points in described areas in Virginia, over irregular routes, through Bluefield, W. Va.

Francis W. McInerny for petitioner.

REPORT OF THE COMMISSION ON PETITION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND MCPHERSON BY DIVISION 1:

This report deals with a petition dated January 14, 1957, filed by Service Storage & Transfer Co., Inc., of Bluefield, W. Va., under section 5(d) of the Administrative Procedure Act for a declaratory order, or, alternatively, for an order interpreting certificate No. MC-30471, respecting its right to engage in the transportation of property, in interstate or foreign commerce, from origin points in Virginia to destination points in that State through Bluefield, W. Va. No replies have been filed.

Petitioner was issued a certificate of public convenience and necessity on January 9, 1941, authorizing operation as a common carrier by motor vehicle, *inter alia*, of

general commodities, with certain exceptions, between Bluefield, W. Va., on the one hand, and, on the other, points in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60, including points on the indicated portions of the highways specified. In No. MC-F-1881, petitioner on April 20, 1943, was authorized to purchase the operating rights of Arthur Goforth, doing business as Goforth Freight Lines, embraced in certificate No. MC-15815, and to unify such rights with those covered by petitioner's initial certificate. Certificate No. MC-15815 authorized the transportation of general commodities, with certain exceptions in interstate or foreign commerce, between Bluefield, Va., and points within 5 miles of Bluefield, Va.,[1] and those within 5 miles of Bluefield, W. Va., on the one hand, and, on the other, points in that part of Virginia and West Virginia within 75 miles of that territory. A certificate consolidating the authority embraced in petitioner's original certificate and the Goforth authority was issued July 27, 1943. This certificate also authorizes petitioner to transport general commodities, with certain exceptions, between Bluefield, W. Va., on the one hand, and, on the other, points in that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va.

Since the issuance of the consolidated certificate, petitioner, by tacking the separate grants of authority at the common point of Bluefield, W. Va., has conducted through operations from points authorized by its original certificate to points authorized in the certificate acquired by purchase from Goforth through the gateway point of Bluefield, W. Va., including operations from origin points in Virginia to destinations in the same State. All such traffic has moved on interstate rates published by petitioner. Shippers using this service have been in-

[1] Bluefield, W. Va., is within 5 miles of Bluefield, Va.

formed that the route of movement would be through Bluefield, W. Va. Generally, the shipments are small, infrequently exceeding 500 pounds. They are consolidated at petitioner's terminal and move in its vehicles with other less-than-truckload shipments originated at or destined to points outside of Virginia.

Petitioner asserts that the Virginia State Corporation Commission, during the past several months, has instituted proceedings against it for the purpose of penalizing it for conducting operations from one point in Virginia to another point in that State, notwithstanding the fact that the shipments moved through Bluefield, W. Va. Additionally, staff members of the State Corporation Commission's office are said to have advised shippers and consignees that transportation performed by petitioner in either single-line or joint-line service from one Virginia point to another Virginia point through Bluefield, W. Va., does not constitute interstate commerce, and that they should cease tendering to petitioner traffic moving between Virginia points. There also is currently pending before the Virginia State Corporation Commission, a proceeding in which State enforcement officials contend that certain shipments handled from Virginia origins to Virginia destinations through Bluefield, W. Va., are not interstate and, accordingly, cannot lawfully be handled by petitioner.

This Commission has found in numerous proceedings that transportation of shipments in bona fide operations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce. Compare *Dixie Freight Lines, Inc., Common Carrier Application,* 24 M.C.C. 780 and *Atlantic Frt. Lines, Inc., Petition*

for Declaratory Order, 51 M.C.C. 175. In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce. This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va. is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part.

We find that the operations described between points in Virginia through Bluefield, W. Va., are bona fide operations in interstate commerce within the authority granted to petitioner in certificate No. MC-30471.

The petition for a declaratory order construing or interpreting petitioner's certificate is satisfied by the foregoing. No order is necessary.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX IV

Order of the Supreme Court of Appeals

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday the 10th day of March, 1958.

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INCORPORATED, *Appellant*,

against

COMMONWEALTH OF VIRGINIA, *Appellee*.

Upon an appeal of right from an order entered by the State Corporation Commission on the 26th day of February, 1957.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the order appealed from. It is therefore adjudged and ordered that the said order be, and the same is hereby affirmed, except in so far as the said order assesses fines for the transportation of goods originating in Roanoke, Lynchburg and Roanoke, Virginia, with respective destinations being Kimballton (Kimbleton), Marion and Abingdon, Virginia, and the cause is remanded to the said Corporation Commission with direction to amend its order with respect to the aforesaid three shipments in accordance with the views expressed in the said written opinion of this Court.

Which is ordered to be certified to the said Corporation Commission.

A Copy,

Teste:

H. G. TURNER
Clerk